May 28, 2004

Via e-mail

John D. Hawke, Jr., Comptroller
Office of the Comptroller of the Currency
Attention: Docket No. 04-09

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
Attention: Docket No. R-1188

Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
Attention: RIN 3064-AC81

Regulation Comments: Chief Counsel's Office
Office of Thrift Supervision
Attention: Docket No. 2004-16
Docket No. 04-09

Becky Baker, Secretary of the Board
National Credit Union Administration
RE: Proposed Rule Part 717, Fair Credit Reporting Medical Information

This comment letter is submitted on behalf of the Consumer Bankers Association ("CBA") in response to the proposed rule ("Proposed Rule") issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision ("Agencies") with respect to medical information. The CBA[1] has a strong interest in the Proposed Rule and this letter includes our comments on it.

SUMMARY

The Agencies have been charged by Congress to issue regulations that permit creditors to obtain and use medical information in connection with a determination of a consumer's eligibility, or continued eligibility, for credit ("eligibility for credit" or "eligibility") when "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs…consistent with the intent…to restrict the use of medical information for inappropriate purposes." In general, CBA believes the Agencies have crafted a Proposed Rule that meets this congressionally mandated objective with respect to certain creditors. We have concerns, however, that the Agencies have limited the scope of the Proposed Rule's applicability

[1]The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

in an unnecessarily narrow fashion which may result in unnecessary problems for many consumers. Furthermore, CBA commends the Agencies for establishing a workable framework with respect to obtaining and using medical information in legitimate circumstances and we offer our constructive thoughts as to how the framework could be improved.

ISSUES RELATED TO SCOPE OF § ___.30

According to the Agencies, any final rule issued to implement the Proposed Rule ("Final Rule") will apply only to certain creditors described by the Agencies. Therefore, a large number of entities, such as many finance companies and arrangers of loans, would apparently not be able to take advantage of the Final Rule's interpretations and exceptions with respect to obtaining and using medical information in connection with the determination of a consumer's eligibility for credit. This would eliminate the ability of countless numbers of consumers from obtaining financing for medical procedures. It would also call into question the legality of the credit granting process as a whole for many finance companies and other creditors not described in the Proposed Rule in instances where they receive medical information on an unsolicited basis, or when they evaluate debts that also qualify as medical information. We do not believe that there is a public policy justification for excluding such creditors from coverage in the Proposed Rule. In fact, we believe it to be *contrary to public policy* to suggest that certain types of lenders should not be permitted to obtain and use medical information as "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs."

CBA also respectfully notes that the limited scope of the Proposed Rule is not consistent with the statutory language. Congress directed the Agencies to "prescribe regulations that permit transactions [that are otherwise prohibited] that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs." Congress did not state that such regulations would apply only to the entities subject to the Agencies respective jurisdictions; indeed, the regulations are to apply simply to "transactions that are determined to be necessary and appropriate," regardless of the Agencies' respective enforcement jurisdiction. The fact that Congress did not intend to limit the scope of the Proposed Rule becomes clearer when reviewing other directives for federal agencies to issue regulations under the Fair Credit Reporting Act ("FCRA"). In particular, section 605(g)(3)(C) of the FCRA requires the Agencies and the Federal Trade Commission ("FTC") to issue regulations specifically limited in scope "with respect to any financial institution subject to the jurisdiction of such [Agency]."[2] There are many other examples of similar language elsewhere in the FCRA, such as under section 621(e) (permitting the Agencies to issue regulations under the FCRA "with respect to" certain types of entities) and under section 623(e) (requiring the Agencies and the FTC to issue guidelines "with respect to the entities that are subject to their respective enforcement authority under section 621"). Therefore, we believe that the plain language of Section 605(g)(5)(A), especially when viewed in contrast to other provisions in the FCRA, indicates that the scope of the Final Rule should not be arbitrarily limited. CBA strongly urges the Agencies to expand the scope of the Final Rule to include any creditor that obtains or uses medical information in connection with a determination of a consumer's eligibility for credit.

[2] Such regulations are proposed as § ___.31 of the Proposed Rule.

The limited scope of these proposed regulations will also affect the financial institutions that are covered by the proposal because "covered" institutions often originate loans through or purchase loans or other extensions of credit from non-covered creditors, such as mortgage brokers and correspondents or automobile dealers. As a result, the proposed approach taken by the agencies would negatively affect businesses that were meant to be covered.

CBA has a very active Automobile Finance Committee. Its members provide both direct and indirect (through auto dealers) auto financing to consumers. As the rule stands, the same transactions could be treated differently because the delivery channel differs.

If the Agencies determine not to provide for a scope that covers all creditors, CBA requests that the Final Rule apply to those creditors that are working in conjunction with an entity that falls within the scope of the Final Rule. In this regard, the Final Rule should not eliminate many types of delivery channels used by entities within the scope of the Final Rule. We do not believe Congress intended to limit the scope of the Final Rule at all, but Congress certainly did not intend to eliminate entire categories of loans for banks and thrifts simply because the loan may be arranged by another entity.

EXAMPLES

The Proposed Rule includes several examples illustrating how the Proposed Rule would be applied to specific fact patterns. According to the Proposed Rule, "[c]ompliance with an example, to the extent applicable, constitutes compliance with" the Proposed Rule and apparently any other rules issued to implement the FCRA. We commend the Agencies for including useful examples in the Proposed Rule and we urge the Agencies to include examples in the Final Rule. We believe that illustrative examples provide useful guidance for entities seeking to understand how the Final Rule will be applied. Furthermore, we agree that compliance with an example should constitute compliance with the Final Rule to the extent applicable. The Agencies should retain this approach in the Final Rule.

DEFINITION OF "MEDICAL INFORMATION"

The Agencies proposed to adopt a definition of "medical information" that is similar to the definition provided in the statute. CBA believes this definition is appropriate. However, we strongly urge the Agencies to clarify that information obtained from a consumer reporting agency that is "coded" pursuant to section 604(g)(1)(C) of the FCRA is not "medical information" for purposes of the Final Rule. Such an approach is consistent with the statutory definition of "medical information" and with the congressional intent as it relates to such coded information. The statute excludes from the definition of "medical information" any information "that does not relate to the physical, mental, or behavioral health or condition of a consumer." Coded information received from a consumer reporting agency does not relate to the health or condition of a consumer, and therefore falls outside the definition of "medical information." Furthermore, Congress specifically addressed how information relating to medical furnishers should be handled and provided the appropriate protections for such information. We do not believe that Congress further intended for the Agencies to impose additional restrictions with respect to information addressed specifically and elsewhere in the statute.

DEFINITION OF "ELIGIBILITY, OR CONTINUED ELIGIBILITY, FOR CREDIT"

The Agencies have provided a definition of the term "eligibility, or continued eligibility, for credit" (as provided above, "eligibility for credit" or "eligibility") as such term is used in the Proposed Rule. The term would mean "the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes." CBA believes that the Agencies have correctly limited the definition to circumstances in which credit is offered or provided only for consumer purposes. The proposed definition is consistent with the general scope of the FCRA, which has traditionally been limited to circumstances involving personal, family, or household transactions. We do not believe it would appropriate for the Agencies to deviate from this longstanding approach. Therefore, we urge the Agencies to retain the concept of limiting the definition of "eligibility" to consumer types of credit.

The Proposed Rule also indicates what is excluded from the term "eligibility for credit." The term would not include:

- The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;
- Any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program (collectively, "forbearance product") are triggered;
- Authorizing, processing, or documenting a payment transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility for credit; or
- Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility for credit.

CBA agrees that the examples provided in the Proposed Rule do not relate to the consumer's eligibility for credit. However, we believe a better approach to explaining what is excluded from the definition of "eligibility for credit" would be to provide a general statement that "the term does not include any issues or circumstances not directly related to the consumer's qualification to receive, or continue to receive, credit," and to provide a non-exclusive list of examples of what is not deemed to be "eligibility for credit." With one exception, we believe the examples provided in the Proposed Rule should be retained in the Final Rule for this purpose.

Use of medical information in connection with forbearance products such as Debt Cancellation Contracts (DCC) and Debt Suspension Agreements (DSA)

A number of CBA members offer products such as Debt Cancellation Contracts and Debt Suspension Agreements. Under a debt cancellation contract, a bank agrees to cancel all or part of a customer's loan upon the occurrence of a specified event. Debt suspension agreements call for the suspension of some or all of a customer's obligation to repay an extension of credit upon the occurrence of a specified event.

With respect to the examples of what is not included in the term "eligibility for credit," the Agencies have provided that any determination of whether the provisions of a forbearance product are triggered would be excluded. CBA believes that the definition should exclude the offering or provision of forbearance products from the definition of "eligibility," not just whether the provisions of such a product are triggered. As a general matter, a consumer's purchase or participation in a forbearance product is not considered part of the consumer's *eligibility* for credit. Therefore, we do not believe it would be appropriate to imply that the offering or providing of such products should be treated as though it were an evaluation of the consumer's creditworthiness.

Alternatively, if the Agencies believe that issues involving forbearance products, other than whether the provisions of such products are triggered, are to be deemed part of a consumer's "eligibility for credit," we believe that an entity should be able to obtain and use medical information in connection with providing forbearance products, and an exception should be provided in the Final Rule. Entities that provide forbearance products may need to obtain limited amounts of information relating to the consumer's health. For example, if the forbearance product offers coverage related to the death of the borrower, the creditor may ask the borrower questions related to borrower's health. The creditor needs this type of information in order to control for risk when offering the consumer such a forbearance product. If the Agencies determine that such activities are deemed to be "eligibility," then an exception should be provided to allow an entity to obtain and use medical information for such products as "necessary and appropriate to protect legitimate…risk…needs" as specified in the FCRA.

GENERAL PROHIBITION AND RULE OF CONSTRUCTION

The Proposed Rule establishes a general prohibition stating that a creditor "may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit" except as provided in the Proposed Rule. The general prohibition is essentially a restatement of the statutory prohibition in the FCRA. The Agencies have included a rule of construction, however, to clarify when a creditor will not be deemed to have obtained medical information. In particular, a creditor does not obtain medical information for purposes of the general prohibition if it "[r]eceives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information" *and* it "[d]oes not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued."

CBA commends the Agencies for recognizing that a creditor should not be held in violation of the FCRA or the Final Rule if the creditor receives medical information on an unsolicited basis and the creditor does not use such information in determining whether to extend or continue to extend credit to the consumer. We believe that such an approach is not only appropriate, but absolutely necessary. A creditor simply cannot be held liable for being the recipient of unsolicited medical information if the creditor does not use such information. We urge the Agencies to retain this concept in the Final Rule. We also urge the Agencies to permit a

creditor to use such information in order to assist consumers, grant a request, or provide them some other benefit.

FINANCIAL INFORMATION EXCEPTION

A creditor may obtain and use medical information under the Proposed Rule so long as: (1) the information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds; (2) the creditor uses the medical information in a manner and to an extent no less favorable than it would use comparable non-medical information in a credit transaction; and (3) the creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any credit determination. CBA believes that the Agencies have included a proper exception to the general prohibition on obtaining or using medical information when such information relates to information ordinarily used in connection with credit underwriting. We urge the Agencies to retain such an exception, with one modification, in the Final Rule. In particular, there may be types of information other than that which relates to debts, expenses, income, benefits, collateral, or the purpose of the loan that a creditor would legitimately need in connection with making an underwriting decision, such as assets. Rather than attempting to describe such types of information that may be necessary now or in the future, we believe the Agencies should simply permit creditors to use medical information as may be necessary to underwrite a loan so long as such information is treated no less favorably than other information and the creditor does not take the consumer's health, history, etc. into account.

Additionally, if the Agencies determine that "coded" information received from consumer reporting agencies is in fact "medical information," we urge that such information be afforded the treatment provided under the financial information exception in the Proposed Rule. In this regard, the information relates to information legitimately used in credit underwriting (*e.g.*, it is included in a consumer report), and the creditor should be permitted to take it into account in a no less favorable way than other information would be taken into account.

SPECIFIC EXCEPTIONS

The Agencies would permit a creditor to obtain and use medical information in connection with any determination of the consumer's eligibility for credit in certain specified circumstances. In general, CBA commends the Agencies for creating exceptions for legitimate purposes, such as for fraud prevention or to comply with applicable legal requirements. We ask the Agencies to clarify the exception pertaining to a determination of whether "the use of a power of attorney or legal representative is necessary or appropriate" so as to ensure that creditors can evaluate the legal competency of a consumer. If the consumer is not competent to enter into a contract, the creditor should be able to determine that the use of a legal representative is necessary in such circumstances before lending to the consumer.

CBA is also concerned that the Agencies may have unnecessarily limited the ability of a creditor to obtain the consumer's, or the consumer's representative's, request to use medical information. The Proposed Rule would permit a creditor to use medical information if the consumer (or representative) requests in writing, on a separate form signed by the consumer (or

representative), that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility for credit.

We agree with the exception to use medical information pursuant to a consumer's request. However, the Supplementary Information to the Proposed Rule appears to limit the usefulness of this exception by indicating that the consumer's consent cannot be obtained "as part of loan applications or documentation" and that the exception would "not be met by a form that contains a preprinted description of various types of medical information and the uses to which it might be put." The Agencies apparently envision "an individualized process in which the consumer informs the creditor about the specific medical information that the consumer would like the creditor to use and for what purpose." CBA respectfully suggests that such limitations by the Agencies will limit the ability of consumers to request creditors to take medical hardships into account. Many creditors may not be able to evaluate individualized, handwritten (since the requests apparently cannot be preprinted or part of an application) requests for use of medical information in an efficient manner—and therefore may not honor such requests. This obviously harms consumers in need of unique evaluations based on medical hardships. However, if a creditor can establish forms for use in connection with automated underwriting systems or other needs, the creditor may be better prepared to take consumers' health-related hardships into account.

We also ask the Agencies to allow creditors to assess medical information in connection with loans above a certain size. CBA understands that Congress intended to protect against the use of medical information with respect to credit underwriting. However, we believe that it is appropriate for creditors to obtain and use medical information in connection with significant personal loans somewhere between $1 million and $10 million for a secured loan and less than that for unsecured loans. We believe that when loan amounts reach such significant levels, the safety and soundness needs of the institution may outweigh the benefit of not obtaining or using medical information. We also note that consumers seeking loans of those sizes are generally more sophisticated and will understand the need for obtaining and using medical information in such circumstances.

LIMITS ON REDISCLOSURE OF INFORMATION

The Proposed Rule states that if a person subject to the scope of the Proposed Rule receives medical information about a consumer from a consumer reporting agency or its affiliate, the creditor must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order. This provision is consistent with the statutory language in the FCRA. We urge the Agencies to provide clarification that a person may redisclose medical information for a purpose authorized under Section 502(e) of the Gramm-Leach-Bliley Act ("GLBA") if such disclosure is related to the purpose for which it was obtained. We do not believe the Agencies intend to restrict the redisclosure of medical information to law enforcement, to prevent fraud, or to the person's auditors, accountants, or attorneys, for example. Therefore, we suggest the appropriate clarification be provided.

SHARING MEDICAL INFORMATION WITH AFFILIATES

Section 602(d)(3) of the FCRA states that the statutory exclusions to the definition of a "consumer report" shall not apply with respect to information disclosed to any affiliate if the information is: (1) medical information; (2) an individualized list or description based on the payment transactions of the consumer for medical products or services; or (3) an aggregate list of identified consumers based on payment transactions for medical products or services. Section 602(d)(3) does not apply to information disclosed: (1) in connection with the business of insurance or annuities; (2) for any purpose permitted without authorization under certain regulations promulgated under the Health Insurance Portability and Accountability Act ("HIPAA"); or (3) as otherwise determined to be necessary and appropriate by regulation or order by the Agencies or the FTC with respect to the financial institutions subject to such agencies jurisdiction. The Agencies have proposed to provide additional exceptions for disclosures: (1) for any purpose referred to in section 1179 of HIPAA; (2) for any purpose described in section 502(e) of the GLBA; (3) in connection with a determination of the consumer's eligibility for credit consistent with the Final Rule; or (4) as permitted by order. We believe these exceptions are appropriate and should be retained in the Final Rule.

Thank you for the opportunity to comment. If you have any questions, please contact me.

Very Truly Yours,

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